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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ANDRES ALONSO, JR.,

Plaintiff-Appellant and Petitioner,

vs.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT AGENCY; JOHN MARCELLO, Drug Enforcement Agent; and OTHER UNKNOWN DRUG ENFORCEMENT AGENCY Agents,

Defendants-Appellees and Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Plaintiff is an attorney representing a client on pending and potential federal criminal charges. A $150,000 cash retainer fee was being messengered to Plaintiff in sealed envelopes addressed to him. Without a warrant, federal agents intercepted the messenger in a domestic airline terminal, allegedly because he was Latin and appeared nervous, interrogated him as to his immigration status, falsely accused him of drug trafficking and finally obtained his unauthorized "consent" to search Plaintiff's sealed papers. Without a warrant and without the slightest evidence to connect the currency to any criminal conduct whatsoever, the federal agents seized the currency and instituted a forfeiture action against it. Incredibly, the

courts below dismissed Plaintiff's suit for return of his illegally-seized retainer fee and for damages for violation of his civil rights simply because Plaintiff refused to violate the law and his professional ethics by disclosing the name of his client and thereby exposing his client to prosecution for the very crimes to which the government alleges that the retainer fee relates.

The specific Constitutional questions arising in the context of this extraordinary case of governmental interference with the attorney-client relationship are:

1. Does the Fourth Amendment permit federal agents to (a) search sealed envelopes being messengered to an attorney without a warrant after detaining the messenger without cause, interrogating him as to his immigration status, falsely

accusing him of drug trafficking, and finally obtaining his unauthorized "consent" to search the sealed envelopes addressed to the attorney, and then (b) seize the $150,000 cash retainer fee sealed in those envelopes without a warrant and without an iota of evidence to connect that money to any crime whatsoever?

2. Do the Fifth and Sixth Amendments and Rule 37 of the Federal Rules of Civil Procedure permit the dismissal of an attorney's suit for return of his illegally-seized retainer fee and for damages for violation of his civil rights, resulting in the loss of the retainer fee and in the impairment of the attorney-client relationship and Fifth and Sixth Amendment rights of his client, because the attorney refuses to violate the law and professional ethics by disclosing the name of his client and

thereby exposing his client to criminal prosecution for the very crimes to which the government alleges (without proof) that the retainer fee relates?

PARTIES TO THE PROCEEDING IN LOWER COURT

Plaintiff: Andres Alonso, Jr.

Defendants: United States of America

Drug Enforcement Agency

John Marcello

Other Unknown Drug Enforcement Agency Agents

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Plaintiff and Appellant, ANDRES ALONSO, JR., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unreported memorandum decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of Plaintiff's suit is reprinted as Appendix A to this petition.

The unreported order of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's petition for rehearing is reprinted as Appendix B to this petition.

The unreported order dismissing Plaintiff's action by the United States District Court, Central District of California is reprinted as Appendix C to this

petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on August 31, 1983. (Appendix A-1.) It denied Plaintiff's petition for rehearing on November 16, 1983. (Appendix B-1.) Plaintiff invokes the jurisdiction of this Court under Title 28, United States Codes, Section 1254(1).

All parties to this proceeding are listed in the caption of the case.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure, Rule 41(e) provides in pertinent part:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property

> was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized . . . . If the motion is granted, the property shall be restored. . . ."

Federal rules of Civil Procedure, Rule 26(b)(1) provides in pertinent part that "Parties may obtain discovery regarding matter, not privileged, which is relevant to the subject matter involved in the pending action."

Federal Rules of Civil Procedure, Rule 37(b)(2) provides in pertinent part, with regard to failure of a party to permit discovery, that the court "may make such orders in regard to the failure as are just."

California Evidence Code, Section 954 provides in pertinent part that an attorney's client "has a privilege to refuse to disclose, and to prevent

another from disclosing, a confidential communication between client and lawyer."

California Evidence Code, Section 955 provides in pertinent part that the "lawyer who received or made a communication subject to the [attorney-client privilege] shall claim the privilege whenever he is present when the communication is sought to be disclosed."

California Business & Professions Code, Section 6068(e) provides in pertinent part that it is the duty of every attorney "to maintain inviolate the confidence, and in every peril to himself to preserve the secrets, of his client."

STATEMENT OF THE CASE

A. The Complaint.

The complaint of ANDRES ALONSO, Jr., against the UNITED STATES OF AMERICA, the DRUG ENFORCEMENT AGENCY and DEA agent JOHN MARCELLO, prays for return of the $150,000 cash retainer fee which Defendants illegally seized and for damages for denial of due process of law and other civil rights.

Original jurisdiction of the District Court was invoked under Title 28, United States Code, Section 1346 (claim against UNITED STATES), Section 2201 (declaratory relief), Section 2202 (injunctive and other relief), Federal Rules of Criminal Procedure, Rule 41(e) (return of illegally-seized property) and general equitable powers of the federal courts. (Mr.

Lucky Messenger Serv, Inc. v. United States, 587 F.2d 15, 16-17 (7th Cir. 1978).)

B. The Denial of Plaintiff's Motion for Return of His Illegally-Seized Retainer Fee.

In the context of this suit, Plaintiff moved for immediate return of the illegally-seized retainer fee. The evidence and admitted facts on his motion showed that DEA agent JOHN MARCELLO saw NELSON VALENCIA get off a commercial airline flight from Miami to Los Angeles. Mr. VALENCIA looked around in the terminal area, walked out to the street carrying a briefcase, looked around again, returned to the baggage claim area, and finally went back to the street and asked a cab driver to take him to a local motel.

Based on nothing more than this, MARCELLO and another DEA agent then

accosted Mr. VALENCIA, interrogated him regarding his immigration status, accused him of being a cocaine courier, and asked to look in the briefcase.

Mr. VALENCIA opened the briefcase and MARCELLO saw two sealed envelopes addressed to Plaintiff in Spanish: "PARA ENTREGAR AL: LICENCIADO ALONSO, TEL: RES 383 0771 OFIC 681 1282." [For delivery to: Attorney Alonso, telephone residence 383 0771 office 681-1282.] MARCELLO asked what was in the envelopes, and Mr. VALENCIA said, truthfully, they were papers for an attorney. MARCELLO asked if he could open the envelopes and warned, "If there is cocaine in the envelopes, I am going to arrest you." Mr. VALENCIA said, "There's no cocaine. Go ahead and open them." MARCELLO opened the envelopes. He found no drugs, but he kept looking and discovered the currency,

which was then seized, although there was not and never has been an iota of evidence that the currency was related to any illegal activity whatsoever.

Thereafter, the UNITED STATES OF AMERICA filed a forfeiture action under Title 21, United States Code, Section 881 alleging that on the date of the seizure, the currency "was furnished or intended to be furnished in exchange for a controlled substance . . . and/or was money traceable to such an exchange, and/or was intended to be used to facilitate a violation of Title 21, United States Code."

Doubting whether Plaintiff had standing to challenge the illegal seizure, the District Court denied his motion for return of his retainer fee.

C. The Order Directing Plaintiff to Reveal the Name of His Client.

Defendants moved for an order compelling Plaintiff to answer questions concerning the identity of the client who sent the currency to him, whether the client had criminal charges brought against him in connection with the matter for which Plaintiff was retained, the terms of the retainer agreement, and other information regarding the source of delivery of the retainer currency.

The District Court ordered Plaintiff to answer most of the questions and advised Plaintiff to state any objection he had to the questions on the record and submit his objections along with his answers to the court in camera.

Plaintiff submitted a declaration to the court in camera in which he answered fully each of the questions

propounded by the Defendants except the questions requiring disclosure of the name of his client. However, Plaintiff fully explained why disclosure of the names would subject the clients to criminal prosecution. Plaintiff gave sufficient information to the court in camera which clearly showed the court that a strong probability existed that disclosure of the names of the clients would implicate said clients in the very criminal activity for which his legal advise was sought.

On August 4, 1982, a hearing was held. The following are some of the relevant statements that were made where the District Court recognized that the Defendants had not made a prima facie case that would have shifted the burden of proof back to the Plaintiff, after the burden of proof shifted to the

defendants, when the Plaintiff raised the attorney-client privilege. However, notwithstanding the District Court's statements, which on the record supported Plaintiff's right to assert the attorney-client privilege, and that the burden of proof had not shifted back to Plaintiff because the Defendants had not made out a prima facie case, the District Court ordered that Plaintiff must disclose the name of the persons who sent the money, where he(they) live, and whether or not he(they) is a client.

Page 25 of Transcript

> "THE COURT" I'm just telling you that you do not have to, if any money was received by you for representing somebody else, you don't have to divulge that fact.
>
> Then you have to answer the questions about Nelson Valencia.
>
> MR. ALONSO: I already did, your honor."

Page 27 of Transcript

"THE COURT: Apparently, the Lawson case on page 218 says that the attorney may invoke the attorney-client privilege unless the government, in this instance, has made out a prima facie case that the attorney was retained in order to promote or continue criminal or fraudulent activities; so I don't think you have made that out."

Pages 28-29 of Transcript

"MR. MALINSKY: Your Honor, I agree with the Court that the name of the client is privileged if to disclose the name would implicate the client in criminal activity.

What I'm saying is that no such showing has been made by Mr. Alonso.

THE COURT: Just a minute. Just a minute. What you want to do is to find out what clients these attorney's fees were paid by; is that correct?

MR. MALINSKY: Correct.

THE COURT: It's your thinking that that information would not be admissible.

Have you ever prosecuted a criminal case?

MR. MALINSKY: Yes, I have.

THE COURT: When?

MR. MALINSKY: Not in this district.

THE COURT: Well, what kind of cases?

MR. MALINSKY: I was an Assistant United States Attorney in Phoenix, Arizona prosecuting criminal cases, your Honor.

THE COURT: Prosecuting conspiracy cases?

MR. MALINSKY: I can't recall offhand if any of them were conspiracy cases or not.

THE COURT: Well, you cannot see that when a person pays fees for another where there's a criminal activity in the field of drugs, that that could not be considered to be an act in furtherance of the conspiracy?"

Pages 30-32 of Transcript

"THE COURT: I would imagine that we are not concerned about anything other than the evidence, but I would just imagine, particularly in view of the filing of this other case, the forfeiture case, that you or somebody has the suspicion that these moneys were sent for illegal purposes; so you say that as far

as his client is concerned, that he doesn't have the right to exercise the Sixth Amendment privilege.

Well, there's a Ninth Circuit case that holds that he does, you know, and it's the case of -- maybe you know the name. It's Stacher, S-t-a-c-h-e-r. It was decided in, I think it was, late '62 or early '63, and it held that the lawyer could assert the Sixth Amendment privilege for his absent client.

I know because I was a U.S. Attorney, and I remember what the decision of the Court of Appeals in reversing was.

MR. MALINSKY: Your Honor, the fact that that other lawsuit has been filed does not -- it does not necessarily follow from that that the money is to be used for an illegal purpose.

THE COURT: Well, I know, but at least you or somebody took the liberty of certifying to the Court because every time that a lawyer signs a pleading, he certifies to the Court that it is filed in good faith.

MR. MALINSKY: I'm not saying that it wasn't. That's not the only basis for forfeiting the money, however.

THE COURT: What's the allegation say of the complaint?

MR. MALINSKY: It charges a violation of 21 United States Code Section 881 which pertains to facilitating the sale of a controlled substance or to forfeit any goods derived from the sale of controlled substances.

THE COURT: Forfeit any goods?

MR. MALINSKY: Property, money obtained as a result of the illegal profits from the sale of controlled substances.

In other words, if the --

THE COURT: It has to be the same money.

MR. MALINSKY: If a drug trafficker derives money from the sale of narcotics and buys a home with it --

THE COURT: Well, supposing he has.

MR. MALINSKY: -- that's forfeitable.

THE COURT: How do you expect to prove this is the precise money? It has to be the same money, according to my recollection.

Well, that's another case, but the point is that it just shows you that -- anyway, I'm holding that he does not have to answer -- and let me read this case of Lawson at page 218, Arabic 4, where it says,

(Reading:)

'In this case, the names of appellant's undisclosed clients and fee arrangements involving other conspirators would implicate those persons in the past conspiracy.'

So he doesn't have to tell, in the absence of any showing, that there is any evidence of a prima facie case of continuing illegal activity when the Sixth Amendment privilege is properly taken, but he must disclose the name of his client who allegedly has sent him the money.

When will you be present for the further taking of the deposition, Mr. Alonso?

MR. ALONSO: Tomorrow."

D. Dismissal of Plaintiff's Action.

Plaintiff declined to reveal the name of his client. He asserted the attorney-client privilege and the Fifth Amendment and Sixth Amendment rights of his client, and advised that he had been instructed by his client that under no circumstances was his name to be revealed.

Defendants filed a motion to dismiss the complaint on the grounds that Plaintiff refused to comply with discovery. Despite the fact that the UNITED STATES GOVERNMENT was claiming that the seized currency was related to an illegal drug sale, and despite the fact that the identity of the client was at best only marginally relevant to the case (no one seriously could doubt that Plaintiff was the intended recipient of

the currency), the District Court nevertheless concluded that Plaintiff was obliged to disclose the name of his client and therefore link his client to the money and the alleged criminal conduct.

Solely because Plaintiff refused to breach his obligations to his client, the District Court dismissed his action:

> "It appearing to the Court that whether the plaintiff is the owner of the $150,000 which he seeks to recover is a material issue in the case and that plaintiff has refused to disclose the name and address of the client who allegedly transmitted the funds through one NELSON VALENCIA as payment for legal services rendered and to be rendered by plaintiff, though ordered to do so by the Court, and the Court being fully advised in the premises,
>
> "IT IS HEREBY ORDERED that the motion to dismiss is granted." (Appendix C-1-2.)

E. The Affirmance of the Dismissal without Ruling on the Illegal Search and Seizure.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal in a memorandum opinion which did not even mention the denial of Plaintiff's motion for return of the illegally-seized property. The Court affirmed the dismissal solely because Plaintiff refused to disclose his client's identity. The Court concluded, contrary to the indisputable facts, that Plaintiff had failed to show that a "strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought." (Appendix A-1-2.)

REASONS FOR GRANTING THE PETITION

A criminal defendant's right to effective assistance of counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." (Powell v. Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932).)

That right is hollow, however, if the defendant effectively can be barred from compensating counsel of his choice as a result of government interference with the delivery of the retainer fee and practically can be prevented from consulting freely with that counsel about pending and potential criminal charges because of fear the attorney can be coerced to reveal the defendant's identity.

As we now demonstrate, that right to counsel was rendered meaningless in

exactly these ways by the actions of federal agents and the rulings of the federal courts in this case.

I

UNDER THE FOURTH AMENDMENT, AN ATTORNEY WHO IS THE INTENDED RECIPIENT OF A CASH RETAINER FEE FOR REPRESENTATION OF A CRIMINAL DEFENDANT IS ENTITLED TO THE RETURN OF HIS FEE FROM FEDERAL AGENTS WHERE THE FEE IS SEIZED BY THOSE AGENTS, WITHOUT A WARRANT, FROM A MESSENGER WHO WAS DETAINED, INTERROGATED, AND FALSELY ACCUSED WITHOUT PROBABLE CAUSE, AND FORCED TO GIVE UNAUTHORIZED CONSENT TO SEARCH SEALED LEGAL PAPERS ADDRESSED TO THE ATTORNEY, AND WHERE THERE IS NO EVIDENCE WHATSOEVER THE CASH RELATES TO ANY CRIMINAL ACTIVITY.

The denial of Plaintiff's motion for return of his illegally-seized $150,000 retainer flies in the face of the Fourth Amendment. Until now, the standard of probable cause under the Constitution was

the probability of criminal activity. (Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317, 2326 (1983); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969).) But the courts below apparently believe that mere speculation of criminal activity is sufficient to deprive a citizen of his constitutional rights.

At every step of the detention, interrogation, search and seizure, the conduct of the federal agents was demonstrably improper. First, the messenger was accosted by the federal agents based on the mere fact that he appeared to be a nervous-looking Latin man who got off a flight from Miami to Los Angeles with a briefcase, went to the baggage claim area and then to the street where he asked a cab driver to take him to a motel. There was nothing to distinguish the messenger from virtually any other Miami

airline passenger arriving at a busy and unfamiliar airline terminal. No detention is justified merely because a suspect fits a few of the informal characteristics of a "drug courier profile." (Reid v. Georgia, 448 U.S. 438, 439-441, 100 S.Ct. 2752, 2753-2754 (1980); United States v. Berry, 670 F.2d 583, 588 (5th Cir. 1982).) To approve such a detention and interrogation would effectively authorize the roust of almost any airline passenger. The Constitution clearly does and should require more than this. (See, Florida v. Royer, 460 U.S. ____, 103 S.Ct. 1319 (1983).)

Second, there could be no valid consent to search the sealed envelopes addressed to Plaintiff. A messenger has no legal authority to consent to the opening of sealed documents addressed to someone else. (United States v. Pressler, 610 F.2d 1206, 1213 (4th Cir. 1979);

United States v. Kelly, 529 F.2d 1365, 1371-1372 (8th Cir. 1976); Corngold v. United States, 367 F.2d 1, 6-10 (9th Cir. 1966).)

Third, the messenger's consent, even if he gave it, could not have been voluntary. He had no option to refuse to cooperate with his interrogators. (Cf. United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1977 (1980).) By challenging the messenger's immigration status and accusing him of drug trafficking, the federal agents gave the messenger no meaningful choice to do anything but consent to a search or risk his personal freedom. (Smith v. Rhay, 419 F.2d 160, 163 (9th Cir. 1969).)

Fourth, even if there was a valid consent to search, it was a consent to search for drugs, not for private papers or money. (United States v. Dichiarinte,

445 F.2d 126, 129-130 (7th Cir. 1971).) As soon as the federal agents saw that the briefcase and sealed envelopes did not contain drugs, which was the purported basis for their search, that should have been the end of that search.

Finally, whatever excuse they had for searching the two sealed envelopes, the federal agents still had absolutely no basis for seizing Plaintiff's currency inside. They knew only that the money was addressed to and intended for delivery to Plaintiff, an attorney. The messenger said he knew nothing about the money and had no interest in it. The agents therefore had not the slightest ground for seizing that money or even suspecting that it was involved in an illegal transaction of any kind, much less in drug trafficking in violation of federal laws. Money is not ordinarily contraband, and the federal

agents had absolutely no reasonable basis for believing that it was contraband in this case.

Plaintiff, as owner of the illegally-seized currency, had a reasonable expectation of privacy and a constitutionally protected interest in it. (United States v. Cella, 568 F.2d 1268, 1280 (9th Cir. 1977).) Even if he was not the owner of the currency, he still had a reasonable expectation of privacy in the sealed envelopes addresssed to him. (Rakas v. Illinois, 438 U.S. 129, 143, 99 S.Ct. 421, 430, fn. 12 (1978); Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841 (1981).) This Court has recently reaffirmed "the general principle that closed packages and containers may not be searched without a warrant." (United States v. Ross, ____ U.S. ____, 102 S.Ct. 2157, 2166 (1982); United States v.

Chadwick, 443 U.S. 1, 11, 97 S.Ct. 2476, 2483 (1977); (United States v. Van Leeuwen, 397 U.S. 249, 251, 90 S.Ct. 1029 (1970).)

In short, the facts here show nothing more than a roust by overzealous federal agents who think any Latin person who looks nervous is fair game for detention, interrogation, and search, and that sealed envelopes addressed to attorneys can be opened and searched at will. This is not and cannot be the law. Plaintiff's Constitutional rights and reasonable expectation of privacy were violated by the Defendants, and he should be entitled to the prompt return of his illegally-seized property.

II

UNDER THE FIFTH AND SIXTH AMENDMENTS AND RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AN ATTORNEY'S SUIT AGAINST THE GOVERNMENT FOR RECOVERY OF HIS ILLEGALLY-SEIZED RETAINER FEE AND FOR DAMAGES FOR VIOLATION OF HIS CIVIL RIGHTS SHOULD NOT BE DISMISSED AS PUNISHMENT FOR THE ATTORNEY OBEYING HIS LEGAL AND ETHICAL DUTIES NOT TO DISCLOSE THE NAME OF HIS CLIENT IN AN UNRELATED CRIMINAL CASE AND THEREBY SUBJECT HIS CLIENT TO FURTHER CRIMINAL PROSECUTION.

This Court has previously recognized the constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. (Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530

(1909).) Rule 37 of the Federal Rules of Civil Procedure, which authorizes the courts to penalize a failure to comply with discovery, must be read in light of the Fifth Amendment mandate that no person shall be deprived of property without due process of law. (Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1089, 1094 (1958).)

Plaintiff submits that the ultimate sanction in a civil case, dismissal of the action, "should be the rare judicial act," used only when a failure to comply with discovery has been due to willfulness, bad faith or fault of the litigant. (Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977); Dunn v. Transworld Airlines, Inc., 589 F.2d 408, 415 (9th Cir. 1978); Backos v. United States, 82 F.R.D. 743 (E.D. Mich. 1979).)

In this case, Plaintiff had no choice but to claim the attorney-client privilege on behalf of his client. (California Evidence Code, Section 955.) Indeed, Plaintiff could not waive the privilege even if he wanted to. The privilege is not his under California law; it belongs exclusively to his client. (California Evidence Code, Section 954.) His client, justifiably fearing government retribution, has expressly instructed Plaintiff not to reveal his name.

Moreover, Plaintiff is mandated by other California law to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." (California Business & Professions Code, Section 6068(e).) Plaintiff would subject himself to civil liability and professional sanction from the State Bar for violating the privilege,

by revealing the name of his client, and exposing his client to criminal prosecution.

Although this Court has not so ruled, it is the consensus that "the identity of a person who seeks the advice of a qualified attorney, on a matter which includes that person's potential criminal exposure, where the mere disclosure of the person's identity would tend to incriminate for past criminal acts, is protected by the attorney-client privilege." (In re Grand Jury Proceedings, 663 F.2d 1057, 1061 (5th Cir. 1981); Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981); in re Grand Jury Proceedings, 600 F.2d 215, 218-219 (9th Cir. 1979); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977); In re Grand Jury Proceedings, 517 F.2d 666, 671 (5th Cir. 1975); Tillotson v. Boughner, 350 F.2d 663, 666

(7th Cir. 1965); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).)

Contrary to the unreasoned conclusion of the Court of Appeals, there can be no doubt that disclosure of the name of the client would subject the client to criminal prosecution. Indeed, in a related action, the UNITED STATES GOVERNMENT itself seeks forfeiture of the currency, alleging it was in fact "furnished or intended to be furnished in exchange for a controlled substance . . . and/or was money traceable to such an exchange, and/or was intended to be used to facilitate a violation of Title 21, United States Code."

Neither Plaintiff nor the messenger has committed or even been charged with any crime relating to the currency. The only person left who had anything to do with the currency was his client, the person who sent or caused it to be sent

to Plaintiff. The government therefore must believe it is Plaintiff's client who was trafficking in drugs. Disclosure of the name of the client would necessarily subject him to prosecution for the very crimes which the government alleges was associated with the currency.

Privileged information is not subject to discovery. (Federal Rules of Civil Procedure, Rule 26(b)(1); United States v. Reynolds, 345 U.S. 1, 6, 73 S.Ct. 528, 531 (1953).) Plaintiff therefore should not have been punished at all, much less indirectly fined $150,000 by dismissal of his action, for asserting the privilege on behalf of his clients as he was required to do by law and professional ethics.

Furthermore, no consideration has apparently been given to any lesser sanction than dismissal. The identity of

Plaintiff's client, if it was material at all, was material only to the issue of the source of Plaintiff's money and not at all material to the validity of the seizure of the currency or to Plaintiff's present right to claim the money. There was ample other evidence on the issue of Plaintiff's ownership of the currency. No one else has ever come forward to claim the currency. The government has no legitimate concern that some unknown third party might be affected by the return of the money to Plaintiff. (United States v. Palmer, 565 F.2d 1063 (9th Cir. 1977) [". . . in the absence of any cognizable claim of ownership or right of possession adverse to that of appellant, the District Court should have granted appellant's motion and returned to him the money taken from him by government seizure."].) It is therefore unreasonable to throw out

Plaintiff's case merely because he was forced to claim the attorney-client privilege on this one issue.

CONCLUSION

The actions of the federal agents and the federal courts in this case have placed Plaintiff in a "Catch-22" situation, forcing him to trade one set of Constitutional rights against another. If Plaintiff stands by his clients, and by his ethical and legal obligations to his clients, as every attorney should do, then the government reaps the double windfall of retaining $150,000 which belongs to Plaintiff and also seriously undermines the ability of Plaintiff's clients to obtain effective legal representation in pending and potential criminal prosecutions. If, on the other hand, Plaintiff reveals the names of his clients, the government will have successfully subverted the civil discovery process to obtain information for criminal prosecutions, and

no criminal defendant will ever again be able to fully place his trust in his attorney.

The District Court's orders placing Plaintiff in this unfair and untenable position, and the judgment of the Court of Appeals affirming those orders, should be reversed.

Respectfully submitted,

Law Offices of
ANDRES ALONSO, JR.

By _____
Andres Alonso, Jr.
Attorneys for Plaintiff,
Appellant, and Petitioner

APPENDIX A

APPENDIX A

ANDRES ALONSO, JR.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DRUG ENFORCEMENT AGENCY; JOHN MARCELLOS, Drug Enforcement Agent; AND OTHER UNKNOWN DRUG ENFORCEMENT AGENCY Agents,
Defendants-Appellees.

No. 82-6017
D.C. No. CV 82-898-FW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the Central District of California.

Hon. Francis C. Whelan, Senior U.S. District Judge, Presiding

Argued and Submitted July 8, 1983

Before: Alarcon and Norris, Circuit Judges, and EAST,* District Judge.

MEMORANDUM

Filed: August 31, 1983

*/ The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

We affirm the district court's dismissal on the ground that Alonso refused to disclose his client's identity. The identity of an attorney's client ordinarily does not fall within the attorney-client privilege, see, e.g., In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975), and cases cited therein. Our inspection of the materials Alonso presented to the district court in camera also demonstrates that Alonso has failed to prove that his client's identity falls within the exception to the general rule: that the name of a client need not be disclosed where a "strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought." United States v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977),

citing Baird v. Koerner, 279 F.2d 623, 630 (9th Cir. 1960) (attorney need not disclose to government name of delinquent taxpayer). The district court thus did not abuse its discretion in ordering Alonso to reveal the name of his client and in dismissing the suit on Alonso's failure to comply.

AFFIRMED.

APPENDIX B

APPENDIX B

ANDRES ALONSO, JR.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT AGENCY; JOHN MARCELLOS, Drug Enforcement Agent; and other unknown Drug Enforcement Agency agents,
Defendants-Appellees.

No. 82-6017
DC# CV 82-898-FW
Central California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Alarcon and Norris, Circuit Judges; EAST,*
District Judge.

ORDER

Filed: November 16, 1983

Appellant's petition for rehearing is denied.

*/ The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

APPENDIX C

ANDRES ALONSO, JR.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
et al.,
Defendants.

No. CV 82-0898-FW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORDER DISMISSING ACTION

Filed: November 1, 1982

Entered: November 2, 1982

The defendants' Motion to Dismiss Complaint; Motion to Compel Discovery; Motion for Service of Copy Upon Defendants of In Camera Filing by Plaintiff, and Motion to Continue Trial was heard by the Court on October 27, 1982. The plaintiff appeared by his attorney Robert J. Jagiello and the defendants appeared by their attorney,

the United States Attorney, by Assistant United States Attorney Philip S. Malinsky. It appearing to the Court that whether the plaintiff is the owner of the $150,000 which he seeks to recover is a material issue in the case and that plaintiff has refused to disclose the name and address of the client who allegedly transmitted the funds through one Nelson Valencia as payment for legal services rendered and to be rendered by plaintiff, though ordered to do so by the Court, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the motion to dismiss is granted.

IT IS FURTHER ORDERED that this action is dismissed with prejudice on the ground the plaintiff has refused to submit to discovery upon a material issue and that defendants shall recover their costs.

IT IS FURTHER ORDERED that, in view of the Court's ruling on the motion to dismiss, defendants' other motions are moot and need not be decided by the Court.

Dated: This 29th day of October, 1982.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

Presented by:

STEPHEN S. TROTT
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Philip S. Malinsky
PHILIP S. MALINSKY
Assistant United States Attorney
Attorneys for Defendants

No. 83-1351

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDRES ALONSO, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly dismissed this suit by petitioner, an attorney seeking to recover currency seized from a courier by DEA agents that petitioner contends was to be delivered to him as a retainer fee, because petitioner refused during discovery to disclose the identity of the client who allegedly paid the fee.

2. Whether petitioner is entitled to recover the currency, which was in any event subject to forfeiture pursuant to 21 U.S.C. 881 because it was the proceeds of a narcotics operation, on the ground that DEA agents violated the Fourth Amendment when they seized it from the courier.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1351

ANDRES ALONSO, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1983, and a petition for rehearing was denied on November 16, 1983 (Pet. App. B1). The petition for a writ of certiorari was filed on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 12, 1982, at Los Angeles International Airport, agents of the Drug Enforcement Administration (DEA) observed passengers arriving from Miami. They noticed one man looking around more than usual at other men and appearing nervous. They then observed him go down the escalator and out to the street, carrying only a

briefcase. He looked around at curbside, walked back inside to the baggage area, and then went back outside to a taxi stand and asked to be driven to an airport motel. Marcello Dep. 8, 15-16, 22.[1]

Agent John Marcello walked up to the man, identified himself as a DEA agent, and asked if he would mind talking to him, stating that he was not required to answer questions. The man, Nelson Valencia, said he had no objection to cooperating and, in response to Marcello's request, produced his airline ticket and a Louisiana driver's license. Valencia said he was a resident alien born in Colombia and residing in Miami. When Marcello asked to see his "green card," Valencia replied that he had left it in Miami. Valencia stated that he had only the briefcase as luggage and that he was not sure how long he would stay in Los Angeles, perhaps a couple of days. Marcello Dep. 24-25.

Marcello advised Valencia that he suspected him of being a drug courier, which Valencia denied. Marcello told Valencia that he would like to look in his briefcase but that Valencia did not have to give him permission to do so. Marcello Dep. 25-26. Valencia then opened the briefcase, revealing two large mailing envelopes inside (*id.* at 19-20, 26). Each envelope was labeled: "Para Entregar Al: Licenciado Alonso [for delivery to: Attorney Alonso], Tel: Res. 383-0771 Ofic 681-1282" (Exhs. 3 & 4; Marcello Dep. App.). The other agent, Darnell Garcia, asked Valencia what was inside the envelopes, and Valencia replied that they contained papers for an attorney (Marcello Dep. 27-28). Garcia asked if the agents could open the envelopes, and Valencia said that they could. Marcello then warned Valencia that if there was cocaine inside, they would arrest him. Valencia replied: "There's no cocaine. Go ahead and

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[1] "Marcello Dep." refers to the deposition of DEA Agent John Marcello taken by petitioner in this case.

open them." The agents did not find drugs inside the envelopes, but they did find approximately $150,000 in currency. *Id.* at 29-30.

Marcello then asked Valencia if he would mind coming to the DEA office at the airport, and Valencia agreed (Marcello Dep. 33). There Valencia explained to the DEA agents that he had received the envelopes from two men — one a Colombian and the other an American — whom he had met in a Miami bar four days earlier. The men had offered Valencia $200 plus expenses to travel to Los Angeles to deliver some papers. Valencia stated that the two men subsequently gave him two packages on February 11, 1982 late at night in the parking lot of a shopping center and instructed him to check into an airport motel and call the telephone numbers on the outside of the envelopes. Marcello Dep. 42-43.

Valencia told the agents that considering the amount of money in the envelopes, it must be drug-related or for some other illegal purpose, and he said he did not want the money back. Valencia also said he knew nothing about the man, petitioner Alonso, whose name appeared on the outside of the envelopes, and he refused the agents' request to call the numbers written on the envelopes to learn what his instructions were. Marcello Dep. 43-46. Valencia was free to leave during the entire period of his encounter with the agents (*id.* at 77).

A DEA agent then called one of the numbers on the envelopes, reached petitioner, and, identifying himself as Nelson Valencia, asked what he should do with the packages (Marcello Dep. 50-52). In response, petitioner came to the airport and was met there by the DEA agents, who identified themselves as such. Petitioner accompanied the agents to the DEA office at the airport, where he explained that he was expecting a check from a client as a retainer for work he planned to perform along with attorney William

Sheffield. The agents told petitioner that they had spoken with someone who had come from Miami with some money that appeared to be intended for him, but that it was not in the form of a check. They asked petitioner how much money he was expecting, and he answered that he was not sure but that it could be anywhere between $100,000 and $650,000 (*id.* at 55-65). When Marcello asked petitioner if he wanted the $150,000, petitioner answered that he did not (*id.* at 67).[2]

2. a. Petitioner subsequently filed the instant civil action seeking to require the government to turn the $150,000 over to him and also seeking damages for alleged constitutional violations in connection with the seizure of the currency. Petitioner filed an interlocutory motion in the civil action for "return" of the currency, but that motion was denied because factual issues remained to be resolved at trial. 10/12/82 Tr. 7-8.[3] At his deposition, petitioner refused to answer a number of questions, including one asking for the identity of the client who petitioner asserted had sent him the money, claiming that this information fell within the attorney-client privilege. Although petitioner states (Pet. 10-11) that he thereafter submitted an in camera declaration in which he answered others of the questions, he persisted in his refusal to identify the client. The district court concluded that whether petitioner was the owner of the $150,000 he sought to acquire was a material issue in the case, and it therefore granted the government's motion to dismiss the complaint as a sanction for petitioner's refusal to submit to discovery on that material issue (Pet. App. C1-C3).

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[2]In his declaration in the related forfeiture action (see page 6, *infra*), Marcello stated (Decl. 6) that petitioner said that if the money was "illegal" he did not want it.

[3]Although petitioner styled his motion as one for "return" of property, in fact the currency was intercepted by the DEA agents before it was delivered to petitioner.

b. The court of appeals affirmed the district court's dismissal of the complaint (Pet. App. A1-A3). The court observed that the identity of an attorney's client ordinarily does not fall within the attorney-client privilege and held that petitioner had failed to show that his client's identity fell within an asserted exception to that rule permitting the client's name to be withheld where there is a "strong probability" that disclosure of the client's identity would implicate him in the very criminal activity for which legal advice was sought (*id.* at A2). It is this decision of the court of appeals that petitioner asks the Court to review here.

3. In the meantime, the United States had instituted an action pursuant to 21 U.S.C. 881(a)(6) for forfeiture of the seized currency as the proceeds of transactions in illegal drugs. *United States* v. *$149,345 U.S. Currency*, No. CV 82-2518-FW (C.D. Cal.). On September 7, 1983, the government moved for entry of judgment in the forfeiture proceeding, supported by declarations establishing that there was probable cause to believe that the currency belonged to one Hipolito Rivera-Ramirez and was the proceeds of illegal drug-trafficking.[4] A declaration by DEA Special Agent Larry Lyons recounted that DEA agents had executed search warrants in September 1981 in Van Nuys, California that uncovered a "huge Colombian cocaine trafficking organization." The agents seized 114 pounds of pure cocaine, almost $2,000,000 in cash, and documents and narcotics ledgers. Lyons' subsequent investigation and examination of the organization's records established that approximately $73,000,000 had been received from the sale of approximately 1328 kilograms of cocaine during the first

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[4]The district court in the forfeiture proceeding, on March 4, 1983, previously had granted the government's motion to strike a claim by petitioner and his associate to the currency because of their refusal once again to identify the client who they asserted had sent petitioner the money.

nine months of 1981 and that the sole source of the organization's income was the sale of cocaine. Lyons stated that Rivera-Ramirez was the leader of the group and that all members of the group were indicted and either pleaded guilty or were convicted in *United States* v. *Rivera-Ramirez*, CR-81-908-TJH (C.D. Cal.). Lyons Decl. 2-3.

DEA Special Agent Marcello filed a declaration in which he stated that the currency Valencia was carrying had been wrapped in rubber bands in mixed denominations between $5 and $100 and that 47 bills had numbers written on them, seven had names written on them, and two had what appeared to be airline baggage tag numbers. Marcello explained that in his experience, currency seized in narcotics-related matters exhibits these common characteristics. Marcello Decl. 7. Marcello also stated that a Los Angeles criminal defense attorney had told him on April 16, 1982, that petitioner was then representing Rivera-Ramirez and that he had heard that the DEA airport group had seized $150,000 of "Hipolito's money" a few months earlier (*id.* at 8).

Assistant United States Attorney Malinsky submitted a third declaration. He stated that Rivera-Ramirez had pleaded guilty to two counts of the indictment in the criminal case on November 16, 1981, and was sentenced on January 19, 1982 to consecutive 15-year sentences and a fine of $25,000 on those counts. Malinsky also stated that records at the federal penitentiary at Lompoc showed that petitioner had visited Rivera-Ramirez on February 16, 1982 (four days after the airport incident) to facilitate an attorney-client relationship and that on that date Rivera-Ramirez signed a form consenting to the substitution of petitioner and William Sheffield as his counsel in the criminal case. Petitioner and Sheffield subsequently filed a motion on Rivera-Ramirez's behalf seeking to withdraw his guilty plea, but the motion was denied. Malinsky Decl. 1-3.

Petitioner appealed the denial on behalf of Rivera-Ramirez, but the court of appeals affirmed (*United States* v. *Rivera-Ramirez*, 715 F.2d 453 (9th Cir. 1983)), noting, inter alia, that the evidence recited at the guilty plea hearing established that Rivera-Ramirez was involved in a substantial cocaine distribution organization and had travelled to Miami to obtain cocaine (*id.* at 458). Petitioner recently filed a petition for a writ of certiorari on behalf of Rivera-Ramirez seeking review of the Ninth Circuit's decision on withdrawal of the guilty plea (*Rivera-Ramirez* v. *United States*, No. 83-1457), which is currently pending.

On the basis of the government's submission and supporting declarations in the forfeiture case, the district court entered judgment in favor of the United States in the forfeiture case on September 22, 1983. Petitioner has appealed that judgment to the Ninth Circuit (Nos. 83-5707, 83-5881 and 83-6303), and oral argument was held on April 4, 1984.

ARGUMENT

1. Petitioner contends (Pet. 29-36) that the court of appeals erred in holding that the identity of the client who he alleges paid him the $150,000 as a retainer fee was not protected by the attorney-client privilege and that the court of appeals therefore erred in affirming the district court's dismissal of the instant civil action seeking possession of the currency and damages. This issue would now appear to be largely academic, because after the Ninth Circuit rendered its decision in this case, the district court entered judgment for the United States in the forfeiture action, thereby confirming title to the $150,000 in the United States. See page 7, *supra*. That judgment of forfeiture was amply supported by evidence that the money in fact had been sent by Rivera-Ramirez and was the proceeds of the latter's illegal drug operations. Thus, even assuming that Rivera-Ramirez caused the money to be sent to petitioner as payment of a retainer fee, rather than merely addressing the envelopes to

petitioner in the course of transmitting funds in connection with his cocaine operation or for other reasons, petitioner would not be entitled to have the currency turned over to him in this civil action. The currency was intercepted by the DEA agents before it was delivered to petitioner. As a result, the United States' right to forfeiture of the currency clearly had priority over any claim petitioner might have to the currency as an anticipated retainer fee. If Rivera-Ramirez actually owes petitioner $150,000, petitioner's recourse now lies against Rivera-Ramirez (who attempted to pay him with currency that was subject to forfeiture), not the United States.

2. In any event, the courts below correctly rejected petitioner's claim in the instant case that the identity of his client was privileged. We recently filed briefs opposing certiorari in two other cases in which the Sixth Circuit likewise rejected a claim that the identity of a client was protected by the attorney-client privilege. See *Doe* v. *United States*, petition for cert. pending, No. 83-1309; *Durant* v. *United States*, petition for cert. pending, No. 83-1468. For the reasons stated more fully in our briefs in opposition in those cases, there is no occasion for the Court to grant review on that issue here.[5]

a. The attorney-client privilege protects only confidential communications made by the client to the lawyer for the purpose of obtaining legal advice. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389-390 (1981); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The identity of the client does not fall within the scope of the privilege, because the mere identification of a person as the client of a lawyer "is preliminary, in its own nature, and establishes only the existence of the relation of client and counsel, and, therefore, might not necessarily involve the disclosure of any

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[5]We have furnished petitioner with copies of our Briefs in Opposition in *Doe* and *Durant*.

communication arising from that relation after it was created." *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 295 (1826). Only where identification of the client in turn would "necessarily involve the disclosure of any communication" made by the client is the lawyer privileged from making that identification. See *In re Osterhoudt*, 722 F.2d 591, 593-594 (9th Cir. 1983); *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 491-495 (7th Cir. 1984). Petitioner does not contend that the mere disclosure of his client's identity would have the effect of revealing the substance of any confidential communications the client made to him. It necessarily follows that the courts below correctly rejected petitioner's invocation of the attorney-client privilege and properly imposed the sanction of dismissal for petitioner's refusal to disclose that information.

b. Petitioner nevertheless contends (Pet. 32) that he should be excused from disclosing the identity of his client because to do so, he asserts, might incriminate the client. This amounts to nothing more than a contention that the attorney may vicariously assert his client's Fifth Amendment privilege, a proposition this Court rejected in *Fisher*, 425 U.S. at 396-401. As we explain in our Brief in Opposition in *Doe* (83-1309 Br. in Opp. 8-12) and *Durant* (83-1468 Br. in Opp. 10-11), application of the attorney-client privilege depends not on whether the information the lawyer is required to disclose might incriminate the client (as under the Fifth Amendment), but rather on whether the lawyer is asked to reveal a confidential communication (whether or not the communication is incriminating). See also *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 491-492; *In re Osterhoudt*, 722 F.2d at 593-594; *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 473 & n.4 (3d Cir. 1979); *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951

(1963). Indeed, Cal. Evid. Code § 954 (West Cum. Supp. 1984), upon which petitioner relies (Pet. 31), explicitly defines the attorney-client privilege as entitling the lawyer to refuse to disclose "a confidential communication between client and lawyer" (Pet. 5). Petitioner's claim of a broader privilege applicable even where confidential communications would not be disclosed therefore is without merit.[6]

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[6]In support of his contention that he is privileged from disclosing his client's identity, petitioner relies (Pet. 32-33) on four prior Ninth Circuit decisions, including *Baird* v. *Koerner*, 279 F.2d 623 (1960), as well as the Seventh Circuit's decision in *Tillotson* v. *Boughner*, 350 F.2d 663, 666 (1965), which followed *Baird* on essentially identical facts. However, in their recent decisions in *In re Osterhoudt* (722 F.2d at 593-594) and *In re Witnesses before the Special March 1980 Grand Jury* (729 F.2d at 492-495), the Ninth and Seventh Circuits, respectively, reexamined *Baird* and *Tillotson* and their other prior precedents and concluded that they actually rested on the fact that confidential communications would have been revealed if the client's identity were disclosed.

Petitioner also relies (Pet. 32) on *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975). However, as we explain in our Brief in Opposition in *Durant* (83-1468 Br. in Opp. 15-17), the lawyers in *Jones* based their claim of privilege on the fact that confidential communications would have been revealed if the clients' identities were disclosed (517 F.2d at 668-669), and the Fifth Circuit in *Jones* repeatedly referred to the matter of the disclosure of confidential communications (*id.* at 672-673, 674-675). *Jones* therefore cannot be read to abandon the principle that the attorney-client privilege protects only confidential communications. The remaining decision relied upon by petitioner (Pet. 32) is that of a panel of the Fifth Circuit upholding a claim of privilege for the client's identity in *In re Grand Jury Proceedings (Pavlick)*, 663 F.2d 1057 (1981). However, the panel in *Pavlick* quoted a passage in *Jones* which in fact links the claim of privilege for a client's identity to the previous disclosure of confidential communications. 663 F.2d at 1061 (quoting 517 F.2d at 674). Moreover, the en banc Fifth Circuit subsequently reversed the panel and rejected the claim of privilege in *Pavlick* (680 F.2d 1026 (1982)), and as we explain in our Brief in Opposition in *Durant* (83-1468 Br. in Opp. 17-19), *Pavlick* likewise should not be read to abandon the nexus to the disclosure of confidential communications that the opinion in *Jones* indicates is required for invocation of the privilege.

c. This would not in any event be an appropriate case in which to consider whether the attorney-client privilege should be extended in the manner petitioner urges. The court of appeals expressly held that petitioner had failed to show a "strong probability" that disclosure of the client's identity would implicate him in the very criminal activity for which legal advice was sought (Pet. App. A2). Thus, even if such an exception were to be recognized, it would, under the court of appeals' decision, be inapplicable in this case.

We note as well that it was petitioner who sought to invoke the aid of the courts to require the government to turn over to him the $150,000 in currency and to recover damages. In such a case, it is entirely reasonable for the court and the United States, the opposing party, to have access to the information underlying petitioner's assertion of an interest in the property seized. That information would have provided some basis for determining whether the currency in fact was intended by a client as the payment to petitioner of a bona fide fee and that it was not the proceeds of illegal drug transactions that were in any event subject to forfeiture.

Surely, if a person sent $150,000 to a doctor or accountant in similar circumstances, neither would be privileged from disclosing that person's identity. The result should be no different here simply because the envelopes containing the currency were addressed to a lawyer. See, *e.g.*, *In re January 1976 Grand Jury (Genson)*, 534 F.2d 719, 727-729 (7th Cir. 1976); *United States* v. *Jeffers*, 532 F.2d 1101, 1114-1115 (7th Cir. 1976), vacated in part on other grounds 432 U.S. 137 (1977). If the result were otherwise, the attorney-client privilege would be converted from a protection against government intrusion and oppression into an instrument to facilitate the commission of crimes. Participants in narcotics distribution schemes would thereby be

given a powerful incentive to transmit the monies involved in their schemes by addressing them to an attorney, so that if the transmittal is detected by law enforcement authorities, the participants could attempt to obstruct an investigation into the circumstances surrounding the transmittal and even seek to recover the money simply by invoking the attorney-client privilege. The nature of the transmittal at issue here indicates that these concerns are present in this very case. See pages 2-4, 5-7, *supra*. These considerations weigh heavily against extension of the attorney-client privilege to protect the client's identity here.

3. Petitioner also contends (Pet. 22-28) that the district court erred in denying his motion for "return" of the currency because the DEA agents' seizure of the currency violated the Fourth Amendment. The district court, however, did not finally resolve this issue. It simply denied petitioner's motion at an interlocutory stage and subsequently dismissed the entire suit because petitioner refused to disclose the identity of the client. The court of appeals affirmed the dismissal on the latter ground. The Fourth Amendment issue therefore is not properly before the Court, and there is not a complete record or findings on which the Court could adequately review that issue.

Moreover, even if petitioner were correct that the currency was seized in violation of his Fourth Amendment rights, the currency nevertheless remained subject to forfeiture pursuant to 21 U.S.C. 881 as the proceeds of illegal narcotics transactions. *Dodge* v. *United States*, 272 U.S. 530, 532 (1926); *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 205 (1845); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 358-359 (1842); *United States* v. *An Article of Device Theramatic*, 715 F.2d 1339, 1341 (9th Cir. 1983), cert. denied, No. 83-965 (Feb. 21, 1984); *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450-451 (9th Cir. 1983), cert. denied, No. 83-5663 (Jan. 16, 1984); *United States* v.

Eighty-Eight Thousand, Five Hundred Dollars, 671 F.2d 293, 297 (8th Cir. 1982).[7] And since the Ninth Circuit's decision in this case, the district court in fact has ordered the currency forfeited to the United States. Petitioner's argument that the property should be "returned" to him in this suit because of an alleged Fourth Amendment violation therefore is both without merit and effectively moot.

In any event, petitioner's various contentions do not on the present record establish a violation of his Fourth Amendment rights. Petitioner first objects (Pet. 23-24) to the DEA agents' conduct when they stopped and questioned Valencia at the Los Angeles airport. However, petitioner's own personal liberty was not affected, and he therefore has no "standing" to object to any violation of Valencia's Fourth Amendment rights in that encounter. *INS* v. *Delgado*, No. 82-1271 (Apr. 17, 1984), slip op. 10; *Rakas* v. *Illinois*, 439 U.S. 128, 133-140 (1978). The DEA agents' encounter with Valencia in fact appears to have been entirely proper. Law enforcement officers do not violate the Fourth Amendment by approaching a person in a public place, asking him if he is willing to answer certain questions, and then asking the questions if he is willing to listen. *INS* v. *Delgado*, slip op. 5-6, 10; *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6 (plurality opinion). Before Valencia went to the DEA office and while he was still in the public part of the terminal (compare *Florida* v. *Royer*, slip op. 2-3, 10-11), Valencia agreed to open the briefcase and consented to the agents' opening of the envelopes exposed inside, after being assured by the agents that he was not required to consent to the search of the briefcase. Marcello

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[7]While the exclusionary rule applies to forfeiture proceedings, it governs only the admissibility of evidence therein and does not bar the forfeiture proceeding itself even if the res was unlawfully seized. Cf. *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

Dep. 25-26, 28, 29-30. It thus appears that the entire encounter with Valencia was consensual, and that a brief detention was lawful in any event because of the agents' reasonable suspicion that Valencia was a drug courier. See *Florida* v. *Royer*, slip op. 6-7, 10-14; *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980); cf. *INS* v. *Delgado*, slip op. 6, 9-10.

Petitioner further contends (Pet. 25) that Valencia's consent to inspection of the briefcase and envelopes was not validly obtained. To the extent petitioner argues that the consent was the fruit of an unconstitutional detention of Valencia (see *Florida* v. *Royer*, slip op. 9; *United States* v. *Mendenhall*, 446 U.S. at 557-558), that argument must be rejected because, as we have already explained, (1) petitioner's rights were not implicated by the alleged violation of Valencia's Fourth Amendment rights, so he may not demand "return" of the currency on the ground that Valencia's consent to its seizure was the fruit of such a violation, and (2) there is in any event no indication that the agents' detention of Valencia was unlawful under the Fourth Amendment. Nor is there any independent reason to believe that Valencia's consent to the search was not freely and voluntarily given. Compare *United States* v. *Mendenhall*, 446 U.S. at 558-559.[8]

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[8]Petitioner contends (Pet. 26) that when the agents found money, not drugs, in the envelopes, they had no right to retain the currency because, he maintains, they did not have the "slightest ground" for suspecting it was related to illegal activity. This argument is without merit. The substantial amount of the currency, the suspicious way in which it was packaged, Valencia's Colombian citizenship and residence in Miami, his conduct at the airport, and his description of how he was retained to deliver the money all indicated criminal activity. What is more, Valencia himself told the DEA agents that given the amount of money, it must be drug-related or for some other illegal purpose. In addition, when petitioner arrived at the airport, he indicated that the amount of money could be as much as $650,000 — an extraordinarily large amount for a

Finally, petitioner contends (Pet. 24-25) that Valencia's consent to search the contents of the envelopes was invalid, even if voluntary and untainted by a Fourth Amendment violation, because Valencia was not authorized to consent to that search. Since the money had apparently been entrusted to Valencia by the sender and had not yet been delivered to petitioner, Valencia, as the person then in possession, presumably could consent to the search (at least if he were not himself prohibited from examining the contents of the envelopes). The record does not fully reflect whether Valencia had the actual or apparent authority of the sender to consent to the search — a point petitioner could not readily establish while he persisted in refusing to identify his "client." Moreover, petitioner himself told the agents that he did not want them to give him the money when they asked him at the airport. See page 4, *supra*.

In any event, as we have said, petitioner would not be entitled to the currency even if he could establish a Fourth Amendment violation, since it was subject to forfeiture anyway. There accordingly is no occasion for the Court to review petitioner's fact-bound Fourth Amendment claim.

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retainer — and stated that he did not want the money back if it were "illegal." See page 4 note 2, *supra*. In these circumstances, the DEA agents had every reason to believe that the money was drug-related and every justification for retaining it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

DOJ-1984-05

No. 83-1351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANDRES ALONSO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITIONER'S REPLY

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PRELIMINARY STATEMENT

The government's Brief in Opposition never responds to our contention that it was unfair and improper to dismiss this action as a sanction for Petitioner's refusal (1) to tell the government what the government claims it already knows and (2) to yield to the government's efforts to sabotage his relationship with his client. Instead, the government's Brief vilifies Petitioner with speculation and innuendo based on triple hearsay outside the record. Its defense of the illegal search and seizure ignores what really happened in this case. And its lengthy, convoluted discussion of why the law of attorney-client privilege is clear, succeeds only in demonstrating that the law is not clear at all.

We now briefly demonstrate the fatal

flaws in the government's arguments and urge that certiorari be granted to resolve for the benefit of all attorneys and their clients the significant issues presented.

LEGAL DISCUSSION

I

PETITIONER SHOULD NOT BE COMPELLED TO REVEAL THE IDENTITY OF HIS CLIENT, SUBJECT HIS CLIENT TO CRIMINAL PROSECUTION, AND DESTROY THE ATTORNEY-CLIENT RELATIONSHIP.

The law regarding the application of the attorney-client privilege to the identity of the client where disclosure of that identity would implicate the client in a crime is in chaos.

a. In California, whose rules and regulations bind Petitioner, a client's identity is privileged where there is a "strong probability" that disclosure of the identity would implicate the client in the criminal activities for which legal service was sought. (Willis v. Superior

Court, 112 Cal.App.3d 277, 299, 169 Cal. Rptr. 301 (1980).)

b. At the time Petitioner refused to implicate his client in this case, the Ninth Circuit followed the California rule. (Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).) And while that seems to be the rule nominally applied by the Ninth Circuit in this case, another panel of the Ninth Circuit recently limited the privilege to protecting the identity of the client only where disclosure would in substance disclose a confidential communication between the client and the attorney. (In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983).)

c. In other circuits, there are as many rules as there are judges to make them. In the Matter of Walsh, 623 F.2d 489, 494, fn. 6 (7th Cir. 1980), the

Seventh Circuit states that "an exception to the non-privileged status of retainer agreements exists where the payor client is unknown." On the other hand, a different panel of the same court in the Matter of Witnesses Before Sp. March 1980 Gr. Jury, 729 F.2d 489, 492 (7th Cir. 1984) prefers a rule that a client's identity or fee arrangement should be privileged only if disclosure would result in disclosure of confidential communications.

d. For yet another rule, see the related cases pending on petitions for certiorari, Durant v. United States, 723 F.2d 447 (6th Cir. 1983) and Doe v. United States, 722 F.2d 303 (6th Cir. 1983), which state that the identity of the client is privileged where there is a "strong possibility" that disclosure would implicate the client.

Review is clearly needed in this case to bring order out of chaos. This is a matter of urgent and growing concern across the country. As evidenced just by the number of cases which have reached this Court, prosecutors more and more often are pursuing the defense attorney as well as the defendant in ways which disrupt or destroy the attorney-client relationship and undermine the ability of the client to obtain effective legal representation.

If the purpose of the attorney-client privilege is to encourage clients to make full disclosure and to promote the broader public interest in the observance of law and the administration of justice (Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981)), then surely the privilege must apply where, as here, the disclosure of the client's identity or fee arrangement would discourage

or prevent clients from seeking the assistance of counsel at all.

II

IT IS FUNDAMENTALLY UNFAIR AND A DENIAL OF DUE PROCESS OF LAW TO DISMISS PETITIONER'S ACTION AGAINST THE GOVERNMENT FOR HIS FAILURE TO REVEAL INFORMATION WHICH THE GOVERNMENT CLAIMS IT ALREADY KNOWS.

In the related forfeiture action, the government convinced the District Court that Petitioner's $150,000 retainer fee came from a reputed drug leader. In this case, the government obtained dismissal of the action on the ground that Petitioner refuses to reveal where his retainer fee came from.

The government cannot have it both ways. If it already knows where the retainer fee came from, than they are

certainly not entitled to have this case dismissed because Petitioner refuses to tell where the retainer fee came from. The drastic sanction of dismissal would not be rationally related to the needs of this litigation. It would serve merely as punishment for Petitioner for doing what he is compelled to do by law and the ethics of his profession. That is not and cannot be the law, and this Court should so rule.

III

THE SEIZURE OF PETITIONER'S RETAINER FEE OUT OF THE ENVELOPES ADDRESSED TO HIM CLEARLY VIOLATED PETITIONER'S OWN PROPERTY INTERESTS AND CONSTITUTIONAL RIGHTS.

Contrary to the government's arguments, the search and seizure issues are properly

before this Court. Petitioner's motion for return of illegally-seized property, which the District Court denied, was duly appealed by Petitioner and is subject to review. The denial of the motion "without prejudice" did not make it any less prejudicial to Petitioner who continues to be deprived of the possession and use of his retainer fee.

Petitioner was entitled to the return of his retainer fee as a matter of law on the admitted facts, and the government has not shown otherwise. First, it plainly was Petitioner's own property interests and constitutional rights which were invaded. The retainer fee was no less Plaintiff's fee merely because government agents seized it before it physically reached him.

Second, the courier, had no actual or apparent authority to consent to search

the envelopes containing Petitioner's retainer fee. The government agents who accosted him certainly could not have believed he did. The envelopes were addressed to Petitioner. The courier said that he had been paid to deliver the envelopes to Petitioner. He claimed no interest in the envelopes or their contents. The government has not even attempted to refute the numerous authorities cited by Petitioner which hold that a courier has no power to consent to the opening of sealed envelopes which are addressed to the intended recipient.

Third, even if the courier could have given consent to search the envelopes, it is clear that this consent was not freely given. The courier had no real choice. This was nothing like INS v. Delgado, No. 82-1271 (Apr. 17, 1984) where workers were free to leave the work place

during a routine check for aliens. Here, the government agents already had the courier pegged as a drug trafficker (they were wrong) and announced their intent to arrest him if the envelopes contained cocaine. The courier could not possibly, much less reasonably, have believed he could "walk away" from this interrogation without answering the agents' questions and allowing the agents to rifle Petitioner's sealed envelopes.

IV

THIS CASE IS NOT ACADEMIC.

Petitioner's suit is for damages for denial of due process of law and other civil rights in addition to return of his illegally-seized retainer fee. Even if the currency itself were subject to

forfeiture in another proceeding, which it is not, this lawsuit still survives in its other aspects.

Moreover, Petitioner is confident the forfeiture will not stand on appeal because there is not an iota of evidence to support a finding that the currency which constituted Petitioner's retainer fee was in any way related to any crime. The government's "evidence" to justify a forfeiture is based on matters entirely outside the record of this case and is the worst sort of hearsay, self-serving conclusions, unfounded speculation, and innuendo. No rational trier of fact could find probable cause to deprive Petitioner of his retainer fee based on the declaration of a government agent who repeated what he had heard another person say he had heard from some other unnamed person about the seizure of someone else's money

several months before.

CONCLUSION

For each of the reasons stated here and in the Petition for Certiorari, it is respectfully submitted that certiorari should be granted in this case to clarify the applicable rules regarding the attorney-client privilege, discovery sanctions, search and seizure, and to prevent the gross miscarriage of justice which occurred here, and to once and for all, set a standard, for all circuits, to correct the existing conflict that presently exists, even among the same circuits.

Respectfully submitted,

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May 1984